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90-142

NO.

Supreme Court, U.S.
FILED
JUL 16 1990
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. DUNKEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 89-1841

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES C. DUNKEL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 88 CR 20010 - Stanley J. Roszkowski, Judge.

ARGUED DECEMBER 8, 1989 - DECIDED APRIL 16, 1990

Before POSNER and EASTERBROOK, Circuit Judges, and DUMBAULD, Senior District Judge.*

EASTERBROOK, Circuit Judge. James C. Dunkel, a dentist, decided in 1981 that the income tax is "voluntary". So he

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* Honorable Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

quit filing tax returns. Just in case the IRS should take a contrary view, Dunkel also started keeping two sets of books, excluding from one any cash receipts and checks that were endorsed over to his staff to pay their salaries without going through his bank accounts. Dunkel testified that he did these things to obtain more "privacy" than the banking system affords him. The jury concluded, however, that he did these things to evade tax, and that he also willfully failed to file his tax returns, in violation of 26 U.S.C. Secs. 7201 and 7203. The district judge sentenced him to three years' imprisonment, to be followed by five years' probation.

Some of the evidence used to convict Dunkel came from his refuse, which an informant culled. After California v. Greenwood, 486 U.S. 35 (1988), there is

no doubt that the contents of Dunkel's dumpster, in which financial records were mixed with worn-out teeth and discarded needles, were not within that zone of privacy to which the Fourth Amendment applies. Nonetheless, Dunkel contends that the dumpster was within the curtilage of his office, so that the informant needed a warrant (or his consent) to approach the dumpster in the first place. If the informant was not entitled to reach the dumpster, the fact that its contents had been abandoned could not justify the search. Consider the status of papers mixed with scrapings from dinner plates in a garbage bag in the kitchen. The police could not invade the home and rifle the bag, however, free their access to its contents would have been, given Greenwood, once it was put outside.

Dunkel owned and maintained his offices in a building that housed two other dentists and five business tenants. All used the same dumpster, which was located off the parting lot of the building, more than 55 feet from the nearest part of the structure. Dunkel's patients and employees, and those visiting other tenants of the building, used the parking lot. Anyone in the parking lot could walk up to the dumpster; the trash hauler that emptied the dumpster came in through the parking lot and needed no key or other entree'. After taking evidence, the district court found that "the fact that the garbage dumpster was being shared by other tenants . . . [and] was accessible to the public . . . supports the finding that there was no reasonable expectation of privacy; and although this dumpster was

170 feet into the property, I think it's clear that that dumpster was accessible to the public, as much as if it were sitting in any other open lot." This finding is not clearly erroneous.

Intoning "curtilage" does not alter the fact that the parking lot was open to all comers--not only Dunkel's invitees but also those of his seven tenants. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). See Oliver v. United States, 466 U.S. 170, 179-80 (1984) ("open fields" doctrine applied despite "no trespassing" signs). Dunkel's redoubt is United States v. Swart, 679 F.2d 698 (7th Cir. 1982), which held that agents could not enter the yard of an auto repair business to

read the vehicle identification numbers from cars there. No one other than Swart and his employees had access to the fenced-in yard where the cars were kept; this is a far cry from Dunkel's open parking lot with 32 spaces used throughout the day by many strangers. Someone who tosses documents into a dumpster to which hundreds of people have ready access has no legitimate expectation of privacy in the dumpster or its contents. United States v. Michaels, 726 F.2d 1307, 1312-13 (8th Cir. 1984), cited with approval in Greenwood, 486 U.S. at 42.

Only three of Dunkel's eight remaining arguments (most with multiple sub-parts) bear comment. Dunkel insists that the charges under Section 7201 are duplicitous because that statute creates two crimes: evading the assessment of

taxes (as by fooling the IRS about your income) and evading the payment of taxes (as by secreting assets after taxes have been assessed). To charge both in one count, Dunkel maintains, is to confuse both the defendant and the jury. Not so. Section 7201 creates only one crime: tax evasion. Section 7201 makes it a crime to "attempt in any manner to evade or defeat any tax imposed by this title or the payment thereof." Just as you can rob a bank in a dozen ways (blow the door off the vault, tunnel from next door and empty the till in the dead of the night, stick up the teller, scoop money out of the cash drawer during business hours when no one is looking, and so on), so you can evade taxes in multiple ways.

Sometimes it is convenient to say that different methods are different "crimes," as the Supreme Court once said

about Section 7201. Sansone v. United States, 380 U.S. 343, 354 (1965); see also United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984). Whether Section 7201 creates multiple offenses in the sense that one who evades his taxes for a single year both by creative bookkeeping and by transferring assets (as the jury could conclude Dunkel did) could be given cumulative punishment is a different matter entirely. If Dunkel were right, he could be punished twice, so long as the government took care to charge the events of a single year in two counts. We need not decide whether Congress has authorized this. It is enough to say that nothing in the text or history of Section 7201 requires an indictment to treat Section 7201 as if it were two sections of the United States Code. The grand jury must let the

accused know the nature and basis of the charge. Dunkel's indictment did so: it listed six specific ways in which he evaded taxes (five in 1981, three in 1983, with two methods used in each year). He knew exactly what he had to prepare the defend against, and the jury knew its role as well. United States v. Shorter, 809 F.2d 54, 58 (D.C. Cir. 1987); United States v. Hawkins, 781 F.2d 1483, 1484 (11th Cir. 1986).

Dunkel contends that 26 U.S.C. Section 7203 is unconstitutionally vague because it requires a taxpayer to "make" a return. No one could understand this, Dunkel insists. Maybe it means "fill in" a return; maybe it means "send in" a return; maybe it even means "construct a return out of raw materials." The district judge thought this frivolous and threatened sanctions. Dunkel's lawyer,

Donald. W. MacPherson, filed in the district court a blizzard of "unnecessary, duplicative and spurious motions, causing the Court to spend valuable time searching through 110 pages of motions which appear to be 'boilerplate' motions duplicated from a word processor." Although this court's Rule 30(a) requires the appellant to attach to his brief the opinions under review, MacPherson deleted from the district court's opinion the portion chastising him and warning that worse could follow. See In re Becraft, 885 F.2d 547 (9th Cir. 1989).

Statutes are not unconstitutional just because clever lawyers can invent multiple meanings. It is enough that a reasonable person can see what Congress is driving at. United States v. Powell, 423 U.S. 87, 93 (1975). Dunkel knew full

well that he had to fill in a return and file it. He had done both through the 1980 tax year. Making a tax return is a term of art for the combination of completing and filing; any accountant or lawyer would have told Dunkel so, had he asked. (Dunkel's accountant actually completed his 1981 return; Dunkel decided not to file it.) Marginal cases of genuine ambiguity can be tackled as they arise. United States v. Bradley, 892 F.2d 634, 636-37 (7th Cir. 1990). This is not one.

Both Section 7201 and Section 7203 require the district court to impose, as part of the punishment, the "costs of prosecution." Neither statute defines "costs," so courts regularly look to 28 U.S.C. Section 1920 for specification of the permissible amounts. E.g. United States v. Procario, 361 F.2d 683 (2d Cir.

1966); United States v. Vaughn, 636 F.2d 921, 922 (4th Cir. 1980). Section 1920(3) defines "[f]ees and disbursements for printing and witnesses" as part of costs; in turn 28 U.S.C. Section 1821(b) limits to $30 per day the "witness fee" an adversary must pay on top of those expenses. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The district court included as part of the judgment $2,037.36 in travel and subsistence costs of Terrence Catalina, the IRS case agent who was also the principal witness against Dunkel. He submits that these expenses are not allowable "costs" because Catalina is an employee of his adversary. Yet nothing in either Section 1920 or Section 1821 excludes a litigant's expenses in producing its employee as a witness, and 5 U.S.C. Section 5537(a)(2), which

prevents a federal official from receiving witness fees, does not speak to expenses. Catalina is not based in Rockford, Illinois (the site of Dunkel's trial). But for Dunkel's actions, the United States would not have incurred the expenses of transporting Catalina to Rockford and feeding and housing him there. So although no case we can find addresses the point (an oddity in view of the number of years these statues have been in force), we hold that the "costs" reimbursable under Section 1920, and therefore Section 7201 and 7203, include the expenses of transportation and subsistence for witnesses employed by the United States. Cf. Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935).

None of Dunkel's other contentions requires comment. We were surprised to discover, however, that the district

judge allowed Dunkel's lawyer to present evidence, and to argue to the jury, that a person's belief that "taxes are voluntary" is a defense to a criminal prosecution. Although only willful evasion or failure to file is criminal, in this circuit a mistaken view of the law does not negate willfulness in the defendant's legal belief is objectively unreasonable. E.g. United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989), cert. granted, 110 S.Ct. 1108 (1990). Like the Lord High Executioner in the Mikado, we've "got a little list" of beliefs that are objectively unreasonable, such as that the 16th Amendment was not properly ratified and that wages are not income. See United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987). We add to that list the belief that payment of income taxes is

"voluntary." Juries should not be invited to decide for themselves whether it is "reasonable" to believe that the income tax is voluntary. Lawyers sometimes joke that the estate tax is a "voluntary tax" in the sense that with careful planning you can avoid it. No tax is "voluntary" in the sense that if you meet the statutory criteria for its imposition, you may elect not to pay. A goodly part of the business of district courts is creating object lessons of that fact. Dr. Dunkel has become another.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MAY 11, 1990

Before

HON. RICHARD A. POSNER, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. EDWARD DUMBAULD, Senior District Judge*

UNITED STATES OF AMERICA,	)	Appeal from the United States Court for the Northern District of Illinois, Western Division.
Plaintiff-Appellee,	)	
No. 89-1841	)	
v.	)	
JAMES C. DUNKEL,	)	No. 88 CR 20010 Stanley J. Roszkowski
Defendant-Appellant.	)	

Order

Defendant-Appellant filed a petition for rehearing and suggestion of rehearing en banc on April 30, 1990. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel

have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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*Honorable Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

APPENDIX C
CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their ... papers and effects, against unreasonable searches and seizures shall not be violated ...

The Fifth Amendment to the United States Constitution provides in part:

> No person shall ... be deprived of life, liberty or property without due process of law ...

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed..., and to be informed of the nature and cause of the accusation; ... and to have the assistance of counsel for his defense.

26 U.S.C. Sec. 7201 provides in part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in

addition to other penalties provided by law be guilty of a felony and upon conviction thereof shall be fined not more than $100,000 ... or imprisoned not more than five years or both, together with costs of prosecution.

26 U.S.C. Sec. 7203 provides in part:

Any person ... required by this title or by regulations made under authority thereof to make a return ... who willfully fails ... to make such return ... at the time or times required by law or regulation shall in addition to other penalties provided by law be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 ... or imprisoned not more than one year or both together with the cost of prosecution.

18 U.S.C. Sec. 3231 provides in part:

The district courts of the United States shall have original jurisdiction exclusive of the courts of the states of all offenses against the laws of the United States.

APPENDIX D

UNITED STATES OF AMERICA,	)	Docket No. 88CR20010
v.	)	Rockford, Illinois
JAMES C. DUNKEL,	)	Thursday, February 9, 1990
Defendant.	)	9:00 o'clock a.m.

VOLUME VII
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
STANLEY J. ROSZKOWSKI,
and a jury

(Excerpts) pages 888-902; 928-930; 942-944; 1043-1046

THE COURT: ... All right. 31. The same ruling on 31 that I made back on the question of willfully. This is simply the statute, and I think that's all that's necessary.

What's your objection to 31? You say you want knowingly in there, too?

MR. MACPHERSON: No, sir, not knowingly in this part. I think my objection here is the problem of -- I have to see the statute.

THE COURT: Yes. I didn't have a copy of the statute at home with me, either.

MR. MACPHERSON: Oh, okay. Now I know. Okay. Now I know my objection.

It's an objection I've made from day one in this case, and that is -- and as the Seventh Circuit has recognized the Ninth Circuit case of U.S. v. Voorhies, there's two charges under this section, willful attempt to evade the assessment -- and that's the part, any tax imposed -- and willful attempt to evade the payment.

So, I still don't' know which he's charged with and --

THE COURT: It says evade or defeat.

MR. MACPHERSON: Well, but it's got both charges. It's got tax imposed. That's the assessment part. Or it's got the "or payment thereof," and that's the

payment part.

So, we have duplicity. We have a statute that permits two different charges, and I think the government should have elected -- and they still don't want to elect, and I still don't know what their theory is, whether he's charged with attempt to evade and defeat the assessment, tax imposed, or attempt to evade and defeat the payment of the tax that was assessed or imposed.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, your Honor, we've held by our position from the very get-going in this. We've told counsel repeatedly in pleadings, I've told him repeatedly in meetings, that the government's theory of the case is based on tax evasion. It's based on evading or defeating the tax imposed.

Counsel continues to bring up this Voorhies, which has been recognized by the Seventh Circuit; and if the court goes back to Voorhies, it recognizes that Voorhies is talking about a very specific fact pattern. It's 7201, involves both evasion of tax and after an assessment of the tax the evasion by hiding assets.

There has been no allegation in the affirmative acts that that's what occurred. There has been no allegation in the indictment that that's what occurred. There has been no allegation in any pleadings that that's what occurred, nd there's been no evidence that's been presented to this court that that's what occurred.

And I think he's continually bringing this up, and it's a red herring to the court. I'm not saying he's doing it under bad faith to the court, but I

just think that this is an issue that resolved against him and --

THE COURT: I agree, and I don't see any point in going on. I'm going to overrule the objection, and I'm going to give 31.

MR. MACPHERSON: May I say one la thing on it?

THE COURT: Sure.

MR. MACPHERSON: I don't mean to belabor it. I disagree with this characterization that we've been put on notice as to the pleadings or --

THE COURT: Well, I've been in this courtroom for eight days, or whatever it is now, and I've heard no other attempt to put any evidence in on any other subject.

MR. MACPHERSON: Well, then the "or the payment thereof" should not be included because that's not what he's

charged with.

From what I understand the government is saying, he's charged with attempting to evade the tax imposed, which is the assessment of the tax. So, the payment, he's not charged --

THE COURT: What you're saying is that that should end "Evade or defeat any tax imposed."

MR. MACPHERSON: Yes, sir.

THE COURT: What do you say to that, John?

MR. MCKENZIE: If that's his only objection, then I'll be glad to change it, your Honor.

THE COURT: Strike out "or the payment thereof"?

MR. MACPHERSON: Yes, sir....

THE COURT: All right. I'll give it as amended. 31.

32. This actually tracks exactly

what was in the previous statutory instruction, isn't it?...

MR. MACPHERSON: May I just have a moment to look at 32?

THE COURT: Sure....

MR. MACPHERSON: Judge, on 32, I knew there was something else. The second element did say evade or defeat the assessment of the tax -- or just the assessment.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, your honor, I think it's confusing to the jury. Moreover, the courts, when you track the statutory language, you're instructing correctly on the law, and that's what this instruction tries to do. It tracks the statutory language.

The Seventh Circuit has an instruction for 7201, and that's found

on, I think, Page 138 of the blue book.

The problem with that instruction is that instruction is geared towards a different factual pattern that's before the court. As you can read through it, that's when somebody files a return, and they fail to include all of their income on it.

It's also a fairly cumbersome instruction, and it doesn't seem to track the language of the statute directly. And what we've tried to do in the government's instruction is track exactly what the statute requires and track the fact pattern before the court.

MR. MACPHERSON: But it's not clear. Again, I'm back to what he's charged with, and 32 isn't clear as to whether he's charged with, and 32 isn't clear as to whether he's charged with defeat the assessment or defeat the payment.

So, just saying defeat the tax, that could be either payment or assessment.

MR. MCKENZIE: That's the crime charged in 7201, evade or defeat the tax. And, as you noted in the previous instruction, "or the payment thereof," that's not in it.

THE COURT: Well, that's certainly what he's charged with. I don't quite understand your objection to it.

You're saying that it's specifically intent to what? Evade the assessment or what? Avoid assessment?

MR. MACPHERSON: I'm saying that the second element should read as the Seventh Circuit Pattern on 138, which is the defendant intended --

THE COURT: Maybe I'm on a different instruction 1 I'm on 37.

MR. MACPHERSON: Oh, I'm sorry. I hadn't finished with 32.

THE COURT: I thought we were done with 32.

MR. MACPHERSON: No. I think you and John had moved to it, and I still had a problem with it.

THE COURT: What's your statement on that?

MR. MACPHERSON: The second element should read as the Seventh Circuit's Pattern on 138, and that is the defendant intended to evade or defeat the assessment.

THE COURT: Or payment?

MR. MACPHERSON: No. The "or payment," that's the other charge. So, it should be assessment of the additional tax.

THE COURT: What's your position on that, John?

MR. MCKENZIE: Judge, I think you have to go back to the statute. This is

the one I was referring to, and I don't think I was clear, your Honor, that this is the charge that really -- this instruction is really directed towards when someone files a return and understates their income on it. It's drafted for those factual patterns.

THE COURT: Here he didn't file a return.

MR. MCKENZIE: That's correct. And I think this court would be safer in following the language of the statute. The statute says evade or defeat the tax and payment thereof.

Now, we've agreed that the "and payment thereof" is not what he's charged with. He's not charged with having been assessed a tax and avoiding payment thereof by hiding his assets.

THE COURT: Well, I think the instruction accurately tracks the factual

situation here, and I'm going to give it.

Let's go to 37. And I take it that your objection would be the same on this one?

MR. MACPHERSON: Just a moment, please. Right. Now we're talking about payment. I think they keep switching horses midstream with me, Judge. It's difficult to defend when -- well, I've said it enough times.

THE COURT: All right. Just a minute. To evade or defeat a tax, which it was a legal duty of the defendant.

MR. MACPHERSON: It should be assessment, defeat the assessment, and forget the payment part.

THE COURT: Why couldn't we amend this slightly to say it was a legal duty of the defendant --

MR. MACPHERSON: The Seventh Circuit has a pattern on it, Judge, on 140; and I

think we should follow the pattern, which would be given -- now that they've clarified what he's charged with, it should be specific intent to avoid assessment of the tax.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, Judge, again, as in the other one, this particular instruction is drafted in the factual scenario of someone who files a return and doesn't report all their income. It's not drafted towards what we have here.

And again, I think the best way of doing this is the instruction we've tendered. It follows the facts before the court and before the jury, and it also tracks the law.

And I'd have some strong objections, your Honor, if it's changed in some way

to all of a sudden talk to the jury about assessment. That's not what he's charged with. He's charged with evasion, evading or defeating the tax. That's the statute.

MR. MACPHERSON: It's my understanding he's charged with willfully and knowingly attempting to evade the assessment of the tax. That's the election, I understand.

MR. MCKENZIE: There's no election, Mac. I've gone over that. He's been charged with the crime. There's no election needed.

I mean, you can call it election for the record, but that doesn't make it election.

MR. MACPHERSON: Well, your characterization.

THE COURT: I don't see how it changes the factual situation and the law

in this case. The fact is that he's charged with attempting to evade his taxes, isn't he, which was a legal duty to pay the government, which he knew was a legal duty.

MR. MACPHERSON: But there's two offenses to that, as the Seventh Circuit recognizes at 138 and then at 140 ....

And then 140, again, they say choose the appropriate terms, and they give the brackets, and I agree with their brackets, and I agree with their assessment.

THE COURT: It says, this section -- looking at Page 138 at the bottom, it says, "This section includes both attempts to avoid payments of taxes and attempt to avoid assessment of taxes." That includes both.

MR. MACPHERSON: The 7201 includes both. That's what I've been saying.

There's two crimes under 7201, and one is attempt to avoid payment, and one is attempt to avoid assessment.

THE COURT: Well, let me take a look at those when I have a chance.

MR. MACPHERSON: Yes, sir.

THE COURT: We'll reserve ruling. That would be what? 32 and 37?

MR. MCKENZIE: Yes, sir.

THE COURT: 32 and 37. All right. Let me take a look at that ...

39. This is the latest direction from the Seventh Circuit. It's right out of Ramsey, r.ght out of Diaz. No question about it. I don't know what the objection is. It's exact language.

MR. MACPHERSON: I know, but the prosecutor earlier was talking about how sometimes these instructions don't fit the factual pattern. This one doesn't fit the factual pattern here. But these

other cases weren't -- the case in which this is taken out of, the exact language, is not a tax case.

THE COURT: Oh, yes, it is. It's a case I tried.

MR. MACPHERSON: No, I mean --

THE COURT: It's a case I tried. It's United States v. Ramsey.

MR. MACPHERSON: Well, I don't think that's the one I'm talking about.

THE COURT: I have it right here. We don't need to look it up.

MR. MACPHERSON: There's another one then where the same language was used.

THE COURT: And there's another one -- there's another one, also, that uses the same language.

Here's Buckner, and I think it's even in that case, too. But it's in Ramsey.

MR. MACPHERSON: It was in Diaz.

THE COURT: I read it yesterday.

MR. MACPHERSON : D-i-a-z, which is --

THE COURT: D-i-a-z. It's in Diaz, too, as well.

MR. MACPHERSON: Conspiracy and cocaine. It was a drug case in Diaz.

THE COURT: Let me see if I have it. I have it in my briefcase, I think.

In any event, it's exact language taken right out of the case. No doubt of that. I'm going to give it. I checked it yesterday. It's right out of United States v. Ramsey.

In fact, they were a little bit critical of me because I gave a little bit different instruction, and they said, well, it was okay, but this is better. And Judge Easterbrook wrote the instruction out.

And I think you took it right out of

that case, didn't you, John?

MR. MCKENZIE: Yes, sir.

THE COURT: Those two cases. Ramsey was a 1986 case. Diaz is a 1988 case. I don't know how much more current I could find, language.

MR. MACPHERSON: Probably not much more, but I don't think it's supported by the factual pattern in this case.

THE COURT: All right. Well, let the record show it's given over objection.

MR. MACPHERSON: 40 -- are we ready for 40, your Honor?

THE COURT: Yes.

MR. MACPHERSON: 40, of course, I've submitted a charge, and I realize this is the state of the law as between more -- it's Seventh Circuit -- this objective versus subjective reasonably, and I've submitted an instruction on that, which

we'll get to later.

THE COURT: You know, I agree that there's some disagreement among the circuits; but, as I told you at the beginning, I follow the United States Supreme Court decisions wherever possible. If there isn't a Supreme Court decision on it, I follow the Seventh Circuit. This is right out of the Seventh Circuit.

I had drawn one that I think is, perhaps, more clear than this one, and I would read it to you and see.

A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, the misunderstanding must be objectively reasonable. Mere disagreement with the law does not constitute such a misunderstanding must be objectively

reasonable. Mere disagreement with the law does not constitute such a misunderstanding nor a defense in this case.

Because I think that everyone is presumed to know the law and follow it, whether they agree with it or not....

MR. MACPHERSON: Let me just check, you Honor. That would be 32.

No. My position is that their 32, which is the elements, doesn't properly state the elements as proposed by the Seventh Circuit and that the second element should read the defendant intended to evade or defeat the assessment of the additional income tax.

THE COURT: But not the payment?

MR. MACPHERSON: He's not charged -- you take out the payment. You choose one or the other. And from what I understand of their theory, their theory is he

attempted to evade or defeat the assessment. So that's the language you use.

I mean, this is a situation in which I agree totally with the Seventh Circuit on that element, and it's just a matter of choosing one or the other; and once you choose the one, then you use the language that they recommend.

THE COURT: What do you say to that, John?

MR. MCKENZIE: Well, we finally have Mr. MacPherson in agreement with the Seventh Circuit. The problem is this instruction doesn't match the crime involved. This instruction matches the crime when someone fails to report all their income.

And I think we've been over this, and the court is aware of the government's position. The government

prefers to go by what the statute says, when the Seventh Circuit hasn't directly addressed the issue, and that's why we've drafted Government's 32.

THE COURT: All right. I'm going to cut this short, and I'm going to agree that -- I'm going to give the government's instruction on these and refuse the others.

MR. BRODY: So, you're going to give 32 and 37 and refuse 73 and 74?

THE COURT: Yes. As I look at them, I think that's proper in the facts in this case.

75.

MR. MACPHERSON: 75, Judge, I would move to strike at the end of the government's case-in-chief, and I'll move again when we close the evidence of the failure to file and the failure to pay.

I don't believe it's proper to have

in the indictment affirmative acts and the list acts that are affirmative and then list things that aren't affirmative acts in that list.

I didn't say that very well. Let me say it again, if I may. They have listed several things that are affirmative acts, and they said these are the affirmative acts. With that listing they've also said the failed to file and he failed to pay the estimated tax. Those are not affirmative acts, and they have no business being included in a list of affirmative acts, and they should be taken out of the indictment and this instruction given.

It's just the same as if -- my theory, at least, is it's the same as if you have a conspiracy charge and acts in furtherance of the conspiracy, and the government doesn't prove them up. Well,

it's a little different in that if they proved them up, they proved that he failed to file nd that he failed to pay, but the Supreme Court has said that those aren't affirmative acts; they're failures to act.

MR. MCKENZIE: Judge, we've been through this before in pretrial. The Spies case said you can't convict on tax evasion when you don't have a commission, as opposed to omission. It didn't say that these acts of omissions weren't chargeable as affirmative acts.

In fact, we've charged them as affirmative acts throughout all of the Northern District of Illinois for many years now.

THE COURT: Yes. We've gone through that, and I think it's been covered, and I'm going to refuse it.

APPENDIX D-1
TESTIMONY OF IRS AGENT KELLEY KILCOIN

THE COURT: Do you realize, Mr. Kilcoin, you're still under oath?

THE WITNESS: Yes, I do.

BY MR. MACPHERSON:

Q. Sir, for the year 1983 and what's in evidence as to third-party checks that the defendant endorsed over for expenses, have you made any calculation as to what tax would be due and owing for 1983 from that income reflected on those checks that were signed over for expenses?

A. I made a calculation that included all the income that he had.

Q. My question is did you make an independent calculation as to just the third-party checks?

A. No, I did not.

Q. And as to 1981, same question. Did you make an independent calculation as to

what tax would be due and owing just from income reflected on the third-party checks?

A. No, I did not.

Q. Same question for 1982 as to what tax would be due and owing from the receipt of the silver coins from Dr. Dunkel (sic).

MR. MCKENZIE: Your Honor, I'm going to object to 1982. Tax evasion is not alleged in that year.

MR. MACPHERSON: If I said '82, I meant '81.

THE COURT: '81. All right.

BY THE WITNESS:

A. No, I didn't make any independent calculation.

BY MR. MACPHERSON:

A. And for 1981, did you make any independent calculation as to what tax would be due and owing from any income

that would be reflected on depositing and cashing checks at an out-of-town bank?

A. No, I did not.

MR. MACPHERSON: Pass the witness, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. MCKENZIE:

Q. Mr. Kilcoin, it's your testimony when you talk about calculation of income, that's based on total income; is that correct?

A. That's true.

Q. And, in fact, when you calculate income, you don't go and say your income tax on this income would be this and this income would be this, do you?

A. No, I don't do that.

A. You do it on a full basis?

A. Yes.

Q. Where all the facts are disclosed?

A. Yes.

MR. MCKENZIE: Thank you, your Honor.

MR. MACPHERSON: Briefly, your Honor.

REDIRECT EXAMINATION

BY MR. MACPHERSON:

Q. Sir, considering that you've done it on all of the income, I take it then you wouldn't be able to tell the jury what amount of tax the defendant attempted to evade by depositing the checks in an out-of-state bank for '81, using third-party checks for '81, or receiving sliver for '81?

A. I wouldn't be able to tell you about the tax for any specific item, no.

Q. And that would be the same as to '83?

A. That's correct.

APPENDIX D-2
THE CHARGE

... Title 26, United States Code, Section 7201 provides in relevant part as follows: Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title shall be guilty of the crime of willfully attempting to evade taxes.

To sustain the charges of attempting to evade or defeat a tax, as charged in Count 1, tax year 1981, and Count 4, tax year 1983, of the indictment, the Government must prove the following propositions:

First, a substantial tax was due and owing by the Defendant;

Second, the Defendant intended to evade or defeat the tax;

Third, the Defendant willfully did some act in furtherance of this intent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the Defendant guilty ...

The evidence need not prove each affirmative act alleged in the indictment for each year in question. However, to sustain the charge of willfully attempting to evade taxes, the Government must show more than a failing by the Defendant to make an income tax return to the Internal Revenue Service.

An affirmative act of the Defendant is an act, the likely effect of which would be to mislead or conceal. If the tax evasion motive plays any part of such act, the act may be an affirmative act, even though the act may serve other purposes, as well ...

With respect to the charges of tax

evasion contained in Count 1, 1981, and Count 4, 1983, the term willfully means voluntarily and intentionally, with the specific intent to evade or defeat a tax which was the legal duty of the Defendant to pay to the Government and which the Defendant knew it was his legal duty to pay.

The word knowingly means that the Defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the Defendant's conduct and by all the facts and circumstances surrounding the case.

You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had

withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word.

A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, the misunderstanding must be objectively reasonable.

APPENDIX E
SUPREME COURT OF THE UNITED STATES

No. A-819

JAMES C. DUNKEL,

Applicant,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, and the Solicitor General having presented no objection,

IT IS ORDERED that issuance of the mandate of the United States Court of Appeals for the Seventh Circuit, case No. 89-1841, be and the same is hereby stayed pending the timely filing of a petition for a writ of certiorari. If the petition is so timely filed, this order is to remain in effect pending this

Court's action on the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue in effect pending the sending down of the judgment of this Court.

/s/ John Paul Stevens

Associate Justice of the
Supreme Court of the
United States

Dated this 25th
day of May, 1990.

APPENDIX F

CITY OF ROCKFORD ORDINANCES (FROM DEFENDANT'S HEARING, EXHIBIT 9)

Sec. 13-25. Refuse not to be collected.

> The following refuse shall not be collected or disposed of by the city:
>
> (a) Dangerous materials or substances such as poisons, acids, caustics, infected materials ...

Sec. 13-26. Containers required.

> No person owning or occupying any building, lot or premises shall allow any refuse to collect or remain upon said lot or premises except in an approved container tightly covered ...

Sec. 13-23. Interference with receptacles.

> No person other than the owner thereof or any officer, employee, contractor or licensee of the city shall move, remove or interfere with any garbage or waste matter receptacle or the contents thereof.

Sec. 19-21. Trespass.

A person commits trespass when he knowingly:

(a) enters the property or any part thereof of another when immediately prior to such entry he receives notice, either oral or written, from the owner or the occupant that such entry is forbidden....